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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

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IB Docket No. 95-22

Market Entry and Regulation of )

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RM-8355

Foreign-Affiliated Entities )

)

RM-8392

**COMMENTS OF COMMUNICATION TELESYSTEMS INTERNATIONAL**

Communication TeleSystems International ("CTS") submits these comments in response to the Commission's Notice of Proposed Rulemaking of February 17, 1995, as amended by the Order of March 15, 1995, extending the response deadlines ("NPRM").

**I. OVERVIEW**

The Commission's "primary goal" in this proceeding is the "promotion of effective competition in the global market for communications services." NPRM, ¶¶ 26, 27. This goal is entitled to universal acclaim. However, the FCC must exercise care in adopting new policies and rules governing foreign carrier investments in U.S. international carriers lest this important potential source of equity capital for small, emerging U.S. carriers — those with the greatest need — would be blocked and competition within the U.S. would be retarded. The Commission's secondary goal of encouraging foreign governments to open their markets is commendable, but not at the price of limiting competition in the U.S. market. The barrier to foreign-supplied equity capital for small, emerging U.S. carriers, together with the resulting limitation on U.S. competition, would be exacerbated if the Commission were to lower the

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threshold for mandatory applications for foreign investments from the control-standard to minority percentages as low as 25 percent or even 10 percent. NPRM, ¶¶ 59, 60, 61.

If the Commission is determined to establish a new test for foreign investment in U.S. carriers — "effective market access" for U.S. carriers' entrance into the markets of the home countries of the foreign carriers seeking to invest in U.S. carriers (NPRM, ¶ 38) —, the Commission should exempt small U.S. international carriers from this barrier to foreign investments. U.S. carriers with gross annual revenues from international services of less than \$125 million, and control of no U.S. bottleneck facilities, should be eligible for foreign carrier investments unencumbered by the "effective market access" barrier. This small-carrier exemption would foster competition in the U.S. international market, and would set an example for other countries to follow in opening their markets to U.S. investors.

In defining a "facilities-based" U.S. carrier, the Commission should be cautious in establishing the criteria of capital investments, as distinguished from leasehold interests, in common carrier cables. NPRM, ¶ 71. Small emerging carriers lacking funds for cable investments might opt to lease cable circuits. These carriers should not be deprived of the more prestigious "facilities-based" classification and relegated to the perceived lesser status of "resale" carriers. Foreign carriers are less likely to grant operating agreements to U.S. resale carriers, as distinguished from facilities-based carriers. The Commission's procompetitive goals would be hampered by an artificial definition of facilities-based carriers which would make it more difficult for them to gain foreign correspondent operating agreements.

Finally, the Commission should adopt rules designed to curtail the anticompetitive tactics of FCC licensees who have a propensity to file irresponsible or unmeritorious petitions to deny

or delay market entry, expansion, or transfer-of-control applications by U.S. carriers. If the FCC were to adopt elaborate foreign market entry investment rules, perennial protestants could frivolously invoke such rules to gain competitive advantages. It is time for the Commission to impose obligations upon protesting carriers whose incessant petitions to deny serve to delay the onset of additional competition and to impose administrative burdens upon the Commission.

## **II. SMALL U.S. CARRIER EXEMPTION**

Although the Commission's objective of encouraging foreign governments to open their markets is commendable, the broad sweep of the NPRM could be counterproductive if it were to retard competition in the U.S. market. We should not try so hard to export our competitive policies that they are weakened at home. By fostering the viability of small, emerging U.S. international carriers, the FCC will go a long way to achieve its objective "through this rule-making" of promoting "the opportunity for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness." NPRM, ¶ 27.

Small, emerging U.S. international carriers are often starved for the working capital essential to the implementation of their entrepreneurial plans. A fertile potential source for this capital is the foreign telecommunications industry.<sup>11</sup> The current FCC rules and policies under Section 214 of the Communications Act and Part 63 of the rules do not require investing foreign carriers or their U.S. carrier beneficiaries to apply for prior FCC permission for non-controlling investments. The optional declaratory rulings sought or being sought in the MCI-BT and Sprint-

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<sup>11</sup> Although the NPRM apparently is not intended to restrict foreign non-carrier investors, they are not the logical source of capital for small U.S. carriers. Foreign carriers — not foreign cosmetic manufacturers, for example, — are more likely to funnel investments into U.S. businesses similar to their own.

DBP-French Telecom cases are for the purposes of providing a comfort level to the foreign carriers for their respective multi-billion dollar investments in two of the largest U.S. carriers. Although the Commission may be correct in proposing its right of prior approval of such massive transactions, the cases of small, emerging U.S. international carriers seeking modest foreign transfusions to fortify their life blood present a totally different situation.

If there were to be an across-the-board rule requiring prior FCC approval of foreign carrier investments, irrespective of the magnitude of the investment or the size of the U.S. carrier beneficiary, small, emerging U.S. international carriers and their potential consumers would be the losers. Under the NPRM, minority-interest foreign carrier investments as low as possibly 10 percent in small U.S. carriers, would be subjected to prior scrutiny by the FCC and competitor U.S. carriers whose self-interests could lead to petitions to deny or delay the investment transactions. In the case of AmericaTel Corporation, 9 FCC Rcd 3993 (1994), cited in the NPRM at n. 14, a foreign carrier investment in a small, start-up U.S. international carrier was delayed for more than one year by a protest by AT&T in reliance upon its RM-8355 petition for rulemaking which led to the instant NPRM. This case is a harbinger of worse to come if the FCC were to adopt an elaborate set of foreign-entry rules and apply them indiscriminately to both massive and tiny transactions.

It would not be in the public interest for the Commission to subject foreign carriers and their U.S. small carrier beneficiaries to the rigorous burden of proving effective market access for U.S. carriers in the home markets of the investing foreign carriers. This burden would be a regulatory thicket in the form of heavily litigated FCC proceedings. There is no surer way of drying-up the source of beneficial foreign investments other than their absolute prohibition.

Small, start-up U.S. businesses are the fountain for the flow of jobs and stimulation of the U.S. economy. The discouragement of the flow of foreign capital into small, emerging U.S. international carriers by burdensome government regulations should be avoided. Indeed, the Commission has recognized the danger that its proposed regulations might "discourage pro-competitive foreign investment." NPRM, ¶ 60. See, also, ¶ 52 ("need to raise capital from foreign sources"); ¶ 56 ("benefit from foreign carrier investment"); and ¶ 58 (desirable "ability of U.S. carriers to attract foreign investment").

Accordingly, we are proposing an exemption of U.S. carriers with gross annual revenues from international services of less than \$125 million and control of no U.S. bottleneck facilities, from the rules and policies proposed in the NPRM. Thus, present rules and policies would continue with respect to foreign carrier investments in U.S. carriers with small emerging international businesses. Prior FCC approval would not be required for investments not rising to the level of control. Transfer-of-control applications would continue to be adjudicated on a case-by-case basis with consideration of all relevant factors, including the procompetitive benefits of the strengthened viability of small, emerging U.S. international carriers resulting from foreign carrier investments. Even controlling foreign carrier investments in small U.S. carriers are unlikely to be a threat to the giants of the U.S. telecommunications industry. FCC grants of transfer-of-control applications could continue to contain procompetitive conditions including "standard nondiscrimination safeguards" (NPRM, ¶ 58); the "no special concession" rule (NPRM, ¶ 86); and the "proportionate return policy" (NPRM, ¶ 91).

The proposed small carrier exemption from any restrictions on foreign carrier investments that might be adopted by the FCC, should set an example for foreign governments to open their markets to U.S. carrier investors.

### **III. FACILITIES-BASED CARRIER DEFINITION**

In addition to the shortage of investment capital, the other major barrier to the success of small, emerging U.S. international carriers, is the difficulty in obtaining foreign correspondent operating agreements. Foreign carriers are often more reluctant to grant agreements to U.S. carriers classified by the FCC as resellers rather than as facilities-based carriers.

Accordingly, the Commission should not adopt any artificial definition of "facilities-based" that might lessen the opportunities of small U.S. carriers to obtain foreign operating agreements. In paragraph 71 of the NPRM, the Commission appears to be proposing, perhaps unwittingly, that carriers who lease U.S. half circuits in common carrier submarine cables will be classified as resale carriers, whereas carriers who purchase IRU or ownership interests will be classified as facilities-based. Small emerging carriers lacking funds for cable investments might opt to lease cable circuits, just as they might elect to lease rather than buy their switching or multiplexing equipment. These carriers should not be deprived of the more prestigious facilities-based classification and relegated to the perceived lesser status of resale carriers, thereby adversely affecting their foreign operating agreement opportunities.

Indeed, the artificiality and inconsistency of the NPRM's proposed carrier definitions is underscored by the attempted delineation between "common" and "private" submarine cables. In the case of common carrier cables, the using carrier must buy rather than lease in order to be

classified as "facilities-based"; whereas the using carrier merely needs to lease capacity in a private cable. If this distinction is based upon the cable proprietor's chosen method of making capacity available, there is a glaring inconsistency with the Commission's apparent rejection of IDB's RM-8392 proposal with respect to the foreign half circuits. IDB had proposed facilities-based status for U.S. carriers who leased foreign half circuits "if that is the maximum interest allowed in that country." NPRM, ¶ 68.

It would appear that leasing cable circuits should entitle U.S. carriers to facilities-based status, irrespective of whether the cable proprietor is a U.S. or foreign entity, or whether the cable has common carrier or private status, and without regard to whether the half circuit is on the U.S. or foreign side. With respect to satellite circuits, the Commission is willing to regard leases as conferring facilities-based status apparently because the FCC does not permit direct access to Intelsat by U.S. international carriers, thus continuing an anachronistic Comsat monopoly. However, other countries have adopted more liberal regulations in this regard than the FCC by permitting carriers to have direct access to Intelsat. In the case of Germany, for example:

"Under its new direct access initiative, Deutsche Telecom envisions a scenario under which satellite service providers in Germany will be permitted to order service, receive bills, register earth stations and conduct all technical and commercial discussions directly with Intelsat — without any involvement from Deutsche Telecom." Telecommunications Reports, March 9, 1995, p. 25.

The foregoing supports IDB's proposal that favorable facilities-based status should be conferred upon U.S. carriers if they obtain the maximum interest allowed by the foreign facility provider, subject to our proposed modification that would permit resource-limited U.S. carriers

to elect to lease rather than buy capacity if that flexibility better served individual carrier's business plans and capital requirements.

It is not at all clear why such flexible arrangements would "undermine" the Commission's international resale policy. NPRM, ¶ 71. If a U.S. carrier provides switched services by a correspondent arrangement and complies with the Commission's international settlements policy, that should entitle it to facilities-based status, irrespective of whether it leases or buys its cable or satellite transmission capacity. In that case, the Commission's resale policy would not apply.

#### **IV. AFFIRMATIVE OBLIGATIONS FOR CARRIER PETITIONERS**

If the Commission were to adopt elaborate foreign carrier market entry rules, FCC licensees who have a propensity to file petitions to deny or delay market entry, expansion, or transfer-of-control applications could frivolously invoke such rules to retard competition.

It is time for the Commission to impose affirmative obligations upon protesting carriers whose incessant petitions to deny serve to delay the onset of additional competition and to impose administrative burdens upon the FCC. Carrier applicants are assessed filing fees (as well as regulatory fees based upon the number of their licenses), must verify certain representations in their applications, and are required to bear the burden of persuasion to obtain authorizations. Carrier protestants, on the other hand, have little if any affirmative obligations and are free to file irresponsible or unmeritorious petitions to deny or delay. Even though such petitions are usually ultimately denied, they can wreak havoc with applicants' procompetitive business plans, especially those of small, emerging, cash-starved carriers. The success or failure of business opportunities often turns on matters of timing. If U.S. carriers' opportunities to obtain foreign

carrier investment capital are unduly delayed by petitions to deny, the vital capital flow might come too late or the potential investors might tire of waiting and turn elsewhere for investments. Thus, petitions to deny, even if ultimately unsuccessful, can serve their intended purpose of killing a deal and forestalling competition to the ultimate detriment of the consumers.

Protestant carriers should have affirmative obligations; they should not be mere naysayers. The Commission should amend Section 1.65 of its rules requiring "continuing accuracy and completeness of information furnished in a pending application" to apply to protesting, as well as to applying, carriers. Both categories of carriers should have an equal disclosure obligation since both invoke FCC processes. CTS' resale applications for Australia (ITC-95-116), Sweden (ITC-95-116), Denmark (ITC-95-125), and Finland (ITC-95-143) have been delayed by AT&T's petitions to deny. In its oppositions to AT&T's petitions, CTS has repeatedly called upon AT&T to disclose its resale activities in those countries through WorldPartners (a global alliance with PTTs and PTT-like entities in the Atlantic and Pacific areas) and Uniworld (an equity partnership with Telia of Sweden, PTT Telecom Netherlands, Swiss PTT and Telefonica of Spain). AT&T's foreign resale activities are relevant to its attempts to deny or delay CTS' resale applications. AT&T, however, has steadfastly ignored CTS' requests.

The Commission should also amend Section 63.52(c) of its rules to require full and complete disclosure of the petitioning carrier's activities, alliances, affiliations, representatives, and operations within the countries covered by the protested application. Finally, Section 63.52(c) should also be amended to require an affidavit from a responsible senior official of the protesting carrier verifying the accuracy of the petition, attesting that it has not been filed to foreclose or delay competition, and swearing that the protesting carrier is in full compliance with

all applicable FCC rules (e.g., Section 63.01(r)'s affiliation-disclosure and no-special-concession provisions) and policies (e.g., standard nondiscrimination safeguards, NPRM ¶ 58).

## **V. PROCEDURAL MATTERS**

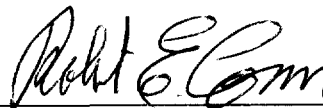
The NPRM has been expertly crafted, well articulated, and contains penetrating issues and proposals. However, the NPRM does not contain the text of any proposed rules — a significant omission. Therefore, it would appear advisable for the Commission to issue a Second NPRM proposing specific textual rules if the Commission, after its review of the record in the First NPRM, determines that specific rules should be adopted. The publication of proposed textual rules by the FCC would make its ultimate actions less vulnerable to appellate court review, should any dissatisfied party seek such review on the grounds of inadequate notice of the Commission's proposed rules.

The NPRM also calls for comments on issues without disclosing the agencies' tentative views. In this respect, the NPRM is more like a Notice of Inquiry. For example, AT&T's proposal restricting refiling is mentioned in paragraph 91 of the NPRM without any FCC editorial comment or specification of any AT&T proposed textual rule. Accordingly, it is difficult for us to comment, given the aforementioned vagaries.

Respectfully submitted,

**COMMUNICATION TELESYSTEMS  
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